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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioner,

v.

THE STATE BAR OF MICHIGAN,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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KIMBALL PRINTING COMPANY

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Our petition for certiorari sets forth fully the reasons for granting the writ. The Brief in Opposition can be read in several ways, including the interpretation that it does not oppose the granting of the writ. In any event that brief does not constitute any answer to the petition. Since this is so, this reply will merely underscore the basic errors in that brief's attempt to defend the indefensible.

1. Respondent spends some time in its "preliminary statement" and its "counter-statement" referring to the facts involved. It renders a discussion of those facts somewhat complicated by developing its own method of

citation to the Record in its second footnote. Our Petition cited to the Record as prepared by the Clerk of the Supreme Court of Michigan. As respondent knows, this results in citations to the 2 volume printed appendix filed in the Michigan Supreme Court being numbered 17 pages higher. Counsel for respondent was so informed by this counsel but now complains that it did not understand the information. The renumbered record filed with the Clerk of this Court was, of course, available to respondent. In answering respondent's citations, we set out both methods of citing to the Record.

Respondent's statement of the "facts" make one doubt that it has read the Record. The Opinion in 1965 by the Supreme Court of Michigan (App. C. pps. 26, 27) was reached after the 1964 *Brotherhood* decision by this Court, but only after a full argument subsequent to the filing of additional briefs by both parties stating what they believed the effect of this Court's decision was. After those events, the Supreme Court of Michigan remanded with "leave to file an amended Complaint." Respondent's statement that the remand was for "further proceedings" is a misrepresentation of the Opinion consistently advanced by it after remand.

Respondent's "other facts" are similarly objectionable. Its attempt to justify the relevance of the only witness it presented again shows that it believes that it is entitled to an injunction because it has proved a "system of unethical or illegal solicitation" despite the fact that this Court in 1964 *Brotherhood*, and every court subsequent thereto, held that the *Brotherhood* plan does not involve any "solicitation." Because of the grossness of the basic error in stating the facts of this matter, it is clear that the opposition to the writ must fail because of a lack of foundation.

We wish to take this opportunity to call the attention of this Court to an obvious error in page 10 of our Petition where the merger into the United States Transportation Union is stated to have been consummated on January 1, 1959 rather than on the proper date of January 1, 1969.

2. Respondent's attempt to justify the injunction results in statements approaching the ludicrous as well as in a complete abandonment of the majority opinion. The quality of that contention can be judged by the fact that it quotes 3 paragraphs from the dissenting opinion in the Virginia Supreme Court of Appeals (Opp. pps. 10, 11). We also note that respondent relies again on newspaper articles in this Court (Opp. footnote 4, p. 7) as it has done since the beginning of this case (R. 71, R. App. 54a). In the last oral argument in the Michigan Supreme Court, counsel for the State Bar was told by the Court not to quote newspaper articles and not to base its argument on those articles. It is not surprising that its brief is based upon such a foundation nor that it should, as a result, have the consistency of a marshmallow.

Not surprisingly, the State Bar in its first point (Opp. pps. 5-14) argues that the union has been fully accorded its constitutional rights under the First and Fourteenth Amendments. However, the reason for that conclusion is quite unclear. Its argument to that effect is, however, noteworthy for its only mention of the Majority Opinion below (Opp. p. 5). Incredibly, that single mention is made in order to assert that the decision below was based on the "premise" that this Court would require that like injunctions be entered in Virginia and in Michigan. Such "premise" is non-existent when the entire opinion below is considered. The thrust of the Majority Opinion is clearly and correctly set out in the Petition.

Respondent later creates a second credibility gap when it states that the ". . . Virginia Court went beyond the specific holding of this Court . . ." in *Trainmen* v. *Virginia*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964). To the contrary, the gist of the Virginia Opinion shows a grudging acceptance of this Court's authority. Petitioner, of course, contends that the Virginia Court erred and acted upon its belief by subsequently petitioning for Leave to Appeal from the entry of the Virginia Decree, which Petition was denied on technical grounds (See, Pet. p. 13).

Respondent's argument is further noteworthy in that it, for the first time, states what it believes to be the meaning of the Decree. Heretofore, the State Bar urged its entry and later its affirmance as being in "conformity" with Virginia. [Indeed, the Bar went so far as to urge, in the trial court, that *Mine Workers* v. *Illinois Bar*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) could not be considered there because of ". . . a specific direction as to amending . . ." the Decree. R. 492, R. App. p. 475a]. Respondent's analysis of the Decree, however, creates new confusions as to its meaning thereby confirming our contention that the Decree would hinder and hamper the union in the exercise of its constitutional rights.

In its analysis, respondent states that the first provision prohibits the practice of law by means of the giving or furnishing of legal advice. That statement, of course, flies squarely in the face of the specific language of this Court's Opinion quoted at page 14 of our Petition. Moreover, it ignores completely the fact that no such claim was made in the Complaint. Indeed, statements made by laymen that a person has a good claim are mere state-

ments of opinion and are not the giving of legal advice nor the practice of law. This is especially so since the union's plan here intends, at the termination of the advice, that the member have his claim handled by the union lawyer. Indeed, Ethical Consideration 2, of Canon 2 of the new Code of Professional Responsibility adopted by the American Bar Association states that the legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed.

Respondent's statement as to the second injunctive provision conjures up a situation neither charged in the Complaint nor existing in reality. It is said that the provision would prohibit the later mass solicitation of claims by lawyers from members who have rejected the union's plan. This statement, of course, contradicts Virginia's interpretation of that provision in modifying it to its present form. That Court stated that the Decree acted solely against lawyers who were soliciting for themselves individually and outside the operation of the *Brotherhood* plan. There is, however, some similarity between the respective analyses in that neither analysis deals with evidence or reality.

The third provision is analyzed as prohibiting the offering of "unethical inducements." Again, there was no claim that such inducements were offered and this analysis flies in the face of the specific wording of the provision which prohibits the suggestion that any expenses or advancements would be defrayed by the lawyer pending the settlement of the claim. The provision would prohibit perfectly proper payments, as well as those payments questionably unethical, presumably on a National basis rather than on a basis limited to Michigan, or perhaps to Virginia.

The fourth provision of the decree prohibits the controlling, either directly or indirectly, of the fees charged by a lawyer. Respondent states that the *Mine Workers* case, where the lawyer is on a salary, is not the controlling of fees but is, instead, the elimination of fees. This sophistry is typical of the rationalizations advanced by the State Bar. In the provision discussed next above, the State Bar candidly complained of "unfair competition." The only reason the controlling of fees has been prohibited anywhere is because of the same allegedly "unfair competition." The total elimination of a fee, of course, renders fee competition impossible and is the ultimate in control of the fee as asserted in our Petition.

The remaining 3 provisions of the decree relate to a supposed profit obtained by the union through the operations of its Legal Services Plan. Suffice it to say that such financial connections are not based on charges, or evidence, and were included in the decree solely because of the Virginia Court's unwillingness to strike any of the Findings of Fact entered in the original 1962 Decree, or any of the injunctive provisions of that Decree except where the striking of the injunctive provisions was specifically required by the Opinion of this Court. The *Mine Workers* decision, for reasons set out in our Petition, prohibits any decree against financial connections even if there were some evidence in the Record to support it. The trial court originally dragged in a provision along these lines which it obtained from *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958) though it recognized that such matter was neither pleaded nor proved (R. 138, R. App. 121a). Referring to source materials outside the Decree is, of course, objectionable as was recognized by the Virginia Supreme Court of Ap-

peals in its Opinion and as accepted by respondent in its Brief (p. 9).

Nothing contained in respondent's first point constitutes an answer to our Petition. Respondent states that we contend that there must be proof of "substantial evils" before an injunction can issue. No such claim is made by Petitioner. The test is correctly stated in this Court's *Trainmen* decision at 377 U.S. 8. There, as here, "the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."

3. Respondent also fails to answer the Petition for Certiorari in its second point. There, it claims that the 1968 judgment is either identical to or a paraphrasing of the specific acts of 5 of the 6 provisions contained in the 1962 Decree which was reversed by the Michigan Supreme Court. (The 6th provision prohibited the union from conspiring with lawyers to violate either the laws as to the practice of law or the canons of ethics of the State of Michigan.) Therefore, it is argued Petitioner had its hearing in June of 1961 on the provisions of the 1968 decretal judgment. That argument, of course, proves too much for, on the same premise, it could also be contended that the 1962 Decree should have been re-entered. Moreover, it is submitted that this is surely not the kind of notice, hearing and "essential fairness" contemplated by the requirement of procedural due process. Especially is this so when the provisions were so stale and the 1962 injunction was primarily based on the pleadings. Furthermore, the Court in 1962 rejected the union's defense that it had complied with the *Illinois* decision on the ground that the defense was "indefinite and uncertain in rela-

tion to the practices complained of" (R. 135, 136, R. App. 118a, 119a). Proof as to the events of the intervening years would, of course, have relieved entirely this conjectural "indefiniteness and uncertainty."

The remainder of respondent's argument is equally unfounded; the State Bar's nit-picking does not distinguish the cases cited in the Petition. It is respectfully submitted that those cases remain applicable for the propositions for which they were cited in our Petition.

CONCLUSION

For the reasons stated herein and in the Petition, certiorari should be granted and, after the granting of the writ, the judgment and Opinion of the Supreme Court of Michigan should be reversed, per Curiam, without remandment.

Respectfully submitted,

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